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IN THE

Supreme Court of the United States

October Term, 1971

No. .....

71-662

RAYMOND CARL ROHM, CYNTHIA LOUISE DREY, GERALDINE CLARK ORTH and REBECCA DARLENE MORRIS,

Petitioners,

vs.

STATE OF CALIFORNIA,

Respondent.

Petition for Writ of Certiorari to the Appellate Department of the Superior Court of the State of California for the County of Orange.

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Petitioners,

vs.

STATE OF CALIFORNIA,

Respondent.

Petition for Writ of Certiorari to the Appellate Department of the Superior Court of the State of California for the County of Orange.

Petitioners respectfully pray that a Writ of Certiorari be issued to review the final judgments of the Appellate Department of the Superior Court of the State of California for the County of Orange entered in the above matter on July 27, 1971.

Opinions Below.

The opinion of the Appellate Department of the Superior Court of the State of California for the County of Orange is appended hereto as Appendix "A". The opinion of the trial court, the Municipal Court of Orange County Harbor Judicial District is appended hereto as Appendix "B". Neither of the two opinions was reported.

Jurisdiction.

Petitioners were convicted of violating Section 314.1 and 314.2 of the California Penal Code. The order of the Appellate Department affirming petitioners' convictions was entered July 8, 1971. The order denying a rehearing and denying certification to the Court of Appeals of the State of California was entered July 27, 1971. Petitions for writ of Habeas Corpus were denied by the Court of Appeal of the State of California on or about September 28, 1971 and by the Supreme Court of the State of California on October 27, 1971. The jurisdiction of this court is invoked under 28 USC § 1257-(3). Petitions on related matters are joined pursuant to Supreme Court Rule *23(5)*.

Questions Presented.

1. Is it a violation of the Due Process Clause of the Fifth and Fourteenth Amendments for a State to require a nightclub owner who has been convicted of procuring or presenting an obscene dance by a nude dancer and a nightclub dancer who has been convicted of performing an obscene dance to register as a sex offender when neither the owner nor the dancer had been charged with or convicted of committing any criminal sexual acts.

2. Does a statute, which requires a person who has been convicted of an obscenity offense to thereafter, and for the rest of his life, register his name and address as a person so convicted with the police in the city or county in which he resides, have a chilling effect and act as a prior restraint upon the exercise of free speech in violation of the First and Fourteenth Amendments?

3. Is it a violation of the Equal Protection Clause of the Fourteenth Amendment for the State to require a

person convicted of procuring, presenting or engaging in the exhibition of an obscene dance to register as a sex offender when persons convicted of exhibiting or distributing obscene motion pictures, photographs, books, magazines and other matter are not required to register as sex offenders?

4. May the owner of a nightclub be convicted of procuring or presenting the performance of an obscene dance by a nude dancer and may the dancer be convicted of performing an obscene dance in the absence of either expert testimony or other competent evidence to establish that the dance substantially exceeded contemporary standards of candor?

Statutory Provisions Involved.

Section 314 of the California Penal Code:

Every person who willfully and lewdly, either

1. Exposes his person, or the private parts thereof, in any public place, or in any place where there are present other persons to be offended or annoyed thereby; or,

2. Procures, counsels, or assists any person so to expose himself or take part in any model artist exhibition, or to make any other exhibition of himself to public view, or the view of any number of persons, such as is offensive to decency, or is adapted to excite to vicious or lewd thoughts or acts, is guilty of a misdemeanor.

Upon the second and each subsequent conviction under subdivision 1 of this section, or upon a first conviction under subdivision 1 of this section after a previous conviction under Section 288 of this code, every person so convicted is guilty of a felony, and is punish-

able by imprisonment in state prison for not less than one year."

Section 290 of the California Penal Code:

§ 290. Registration of sex offenders.

Duty to Register; Time.

Any person who, since the first day of July 1944, has been or is hereafter convicted in the State of California of the offense of assault with intent to commit rape or the infamous crime against nature, under Section 220, or of any offense defined in Sections 266, 267, 268, 285, 286, 288, 288a, subdivision 1 of Section 647a, subdivision 2 or 3 of Section 261, subdivision (a) or (d) of Section 647, or subdivision 1 or 2 of Section 314 or of any offense involving lewd and lascivious conduct under Section 272; or any person who since such date has been or is hereafter convicted of the attempt to commit any of the above-mentioned offenses; or any person who since such date or at any time hereafter is discharged or paroled from a penal institution where he was confined because of the commission or attempt to commit one of the above-mentioned offenses; or any person who since such date or at any time hereafter is determined to be a mentally disordered sex offender under the provisions of Article 1 (commencing with Section 6300) of Chapter 2 of Part 2 of Division 6 of the Welfare and Institutions Code; or any person who has been since such date or is hereafter convicted in any other state of any offense which, if committed or attempted in this state, would have been punishable as one or more of the above-mentioned offenses shall within 30 days after the effective date of this section or within 30 days of his coming into any county or city, or city and county in which he resides or is

temporarily domiciled for such length of time register with the chief of police of the city in which he resides or the sheriff of the county if he resides in a unincorporated area.

Notice of Duty to Register; Prisoner or Inmate.

Any person who, after the first day of August, 1950, is discharged or paroled from a jail, prison, school, road camp, or other institution where he was confined because of the commission or attempt to commit one of the above-mentioned offenses or is released from a state hospital to which he was committed as a mentally disordered sex offender under the provisions of Article 1 (commencing with Section 6300) of Chapter 2 of Part 2 of Division 6 of the Welfare and Institutions Code shall, prior to such discharge, parole, or release, be informed of his duty to register under this section by the official in charge of the place of confinement or hospital and the official shall require the person to read and sign such form as may be required by the State Bureau of Criminal Identification and Investigation, stating that the duty of the person to register under this section has been explained to him. The official in charge of the place of confinement or hospital shall obtain the address where the person expects to reside upon his discharge, parole, or release and shall report such address to the State Bureau of Criminal Identification and Investigation. The official in charge of the place of confinement or hospital shall give one copy of the form to the person, and shall send two copies to the State Bureau of Criminal Identification and Investigation, which bureau, in turn, shall forward one copy to the appropriate law enforcement agency having local jurisdiction where the person expects to reside upon his discharge, parole, or release.

Notice of Duty to Register; Probationer or One Paying Fine.

Any person who after the first day of August, 1950, is convicted in the State of California of the commission or attempt to commit any of the above-mentioned offenses and who is released on probation or discharged upon payment of a fine shall, prior to such release or discharge, be informed of his duty to register under this section by the court in which he has been convicted and the court shall require the person to read and sign such form as may be required by the State Bureau of Criminal Identification and Investigation, stating that the duty of the person to register under this section has been explained to him. The court shall obtain the address where the person expects to reside upon his release or discharge and shall report within three days such address to the State Bureau of Criminal Identification and Investigation. The court shall give one copy of the form to the person, and shall send two copies to the State Bureau of Criminal Identification and Investigation, which bureau, in turn shall forward one copy to the appropriate law enforcement agency having local jurisdiction where the person expects to reside upon his discharge, parole, or release.

Contents of Registration.

Such registration shall consist of (a) a statement in writing signed by such person, giving such information as may be required by the State Bureau of Criminal Identification and Investigation, and (b) the fingerprints and photograph of such person. Within three days thereafter the registering law enforcement agency shall forward such statement, fingerprints and photograph to the State Bureau of Criminal Identification and Investigation.

Change of Address.

If any person required to register hereunder changes his residence address he shall inform, in writing within 10 days, the law enforcement agency with whom he last registered of his new address. The law enforcement agency shall, within three days after receipt of such information, forward it to the State Bureau of Crinimal Identification and Investigation. The State Bureau of Criminal Identification and Investigation shall forward appropriate registration data to the law enforcement agency having local jurisdiction of the new place of residence.

Violation; Offense.

Any person required to register under the provisions of this section who shall violate any of the provisions thereof is guilty of a misdemeanor.

Confidential Records.

The statements, photographs and fingerprints herein required shall not be open to inspection by the public or by any person other than a regularly employed peace or other law enforcement officer.

Statement of the Case.

Petitioner Raymond Carl Rohm is the owner and operator of the "Firehouse", a bar and nightclub in the City of Costa Mesa, California, at which entertainment is presented by female dancers who perform on a stage and perform part of their dances while nude. The other three petitioners are dancers who were employed there.

On October 27, 1970, a complaint was filed in the Municipal Court of Orange County Harbor Judicial

District, charging petitioner Rohm with having committed a violation of Section 314.2 of the Penal Code. (App. C.)

On August 25, 1970, a complaint was filed in the Municipal Court of Orange County Harbor Judicial District, charging petitioner Orth with having committed a violation of Section 314.1 of the Penal Code on August 22, 1970. (App. D.)

On October 19, 1970, a complaint was filed in Municipal Court of Orange County Harbor Judicial District, charging petitioner Morris with having committed a violation of Section 314.1 of the Penal Code on October 17, 1970. (App. E.)

On October 21, 1970 amended complaints were filed in the Muncipal Court of Orange County Harbor Judicial District, charging petitioner Drey with having committed a violation of Section 314.1 of the Penal Code on September 3, 1970 and September 4, 1970. (App. F and G.) On October 26, 1970, a complaint was filed in the Muncipal Court of Orange County Harbor Judicial District, charging petitioner Drey with having committed a violation of Section 314.1 of the Penal Code on October 17, 1970. (App. H.)

On December 2, 1970, petitioners demurred to the complaints; said demurrers were overruled. Said demurrers were based upon the proposition that the complaints had failed to state public offenses and that a person charged with presenting obscene entertainment could not be convicted of a crime which required registration as a sex offender.

The trials of the cases were held on February 9, 1971 before the Honorable Donald M. Dungan, Judge of the Municipal Court. The trials were held at the

same time as the trials of 20 other cases involving dancers at the Firehouse who were charged with performing obscene dances at the Firehouse on various dates. Of the other 20 alleged offenses, the performances by Cynthia Louise Drey and Rebecca Darlene Morris on October 17, 1970 were the only performances which petitioner Rohm was alleged to have procured in violation of Section 314.2 of the Penal Code.

All 26 cases were tried before the court without a jury upon a common set of stipulations. The stipulated facts pertinent herein were as follows:

In each case the defendant was dancing on a raised platform or stage located in the center of the establishment, approximately 15 feet long and 5 feet wide and 2 feet above the floor level; that connecting with and immediately adjacent to the stage is a 1½ to 2 foot wide bar counter top which completely encircles the stage and which is about one foot higher than the stage; that bar stools are provided for customers to sit at this bar; that customers so seated are within one to four feet of the edge of the stage and on an approximate eye level with the dancer's private parts.

I. Facts Relating to Rohm, Morris and Drey.

On October 17, 1970, two plainclothes police officers entered the Firehouse as customers at about 9:30 P.M. At the time they entered a dancer named Rebecca Darlene Morris was performing on the stage. She was wearing pants, a shawl and a necklace that covered her chest. During the next half hour she removed these articles of clothing and continued to perform nude after 10:00 P.M. While Morris danced around the stage she took positions in front of the cus-

tomers seated on the bar stools, such that her vagina was approximately 4 - 6 inches from the customer's face, while moving her hips back and forth. She also raised her leg above the customer's face, with her vagina some 3 - 5 inches from the customer. This was repeated with several customers. Morris was arrested at the conclusion of her performance by uniformed officers who entered the bar from outside.

After Morris was arrested Cynthia Louise Drey began performing on the stage, wearing a mini-skirt and panties. She removed the clothing during the first part of the performance and continued to dance while nude. She raised her leg over the head of several customers, so that her vagina was 2 - 3 inches from the customer's face. She leaned in front of three or four customers and allowed them to lick her breasts. On another occasion Drey leaned forward and dipped her breast in a glass of beer. Later, she moved in front of a customer while holding in her fingers a piece of popcorn. The popcorn was held 3 - 4 inches in front of her vagina and it was taken from her fingers by a customer with his mouth.

At the conclusion of this performance the stage lights flashed on and off and Drey left the stage, entering a room. She dressed and returned to the stage area, where she had a conversation with Rohm, who had been inside the bar during her performance.

Drey then returned to the stage and commenced performing again. She removed her clothing and danced nude. She again approached patrons seated on the barstools and held her leg over their heads with her vagina a few inches from their faces and danced with her hips moving forward and backward. On two or three occasions she turned her back to a customer, bent

forward and reached between her legs to light his cigarette. During another part of the performance she balanced a lit cigarette on the nipple of her breast and had a customer remove the cigarette with his mouth.

Rohm was observed to remain in the premises during the second performance, which was terminated by the entry of uniformed police officers who arrested both Drey and Rohm.

II. Facts Relating to Drey Only.

A. On September 3, 1970, plainclothes police officers of the City of Costa Mesa entered the Firehouse Bar. At the time the officers entered Drey was wearing a white veil loin cloth which exposed her pubic area and buttocks. She was squatting near the north end of the stage in front of a patron. The patron lit a match or cigarette lighter and held it near Drey's pubic area. Drey then stood and danced around the stage. She moved the loin cloth in front of her pubic area, but it moved as she danced so that her pubic area was visible. The officers then arrested Drey as her dance continued and ordered her off of the stage.

B. On September 4, 1970, other plainclothes Costa Mesa police officers entered the bar and observed Drey begin dancing on the stage. She was wearing a tan blouse and black pants. After dancing this way for five minutes she removed the blouse and pants and continued dancing in a long loin cloth which did not cover her pubic or anal areas. She danced in the loin cloth for about 20 minutes. During the dance the officers observed her make gestures which they believed suggested sexual intercourse and anal copulation. At the end of that period, Drey was arrested.

III. Facts Relating to Orth Only.

On August 22, 1970, police officers entered the Firehouse and observed Orth dancing on the stage completely nude. During the dance she went into a crouching position that exposed her anus to some of the customers. During the remainder of the dance she moved the lower portion of her body frontwards and backwards, which suggested sexual relations to the officers. On several occasions she rubbed her pubic area with her hand. Orth was arrested at the conclusion of her dance.[1]

IV. Common Procedural Facts.

The people offered no other evidence. The Municipal Court found each of the defendant dancers, including Drey, Morris and Orth, guilty of indecent exposure in violation of Section 314.1 of the California Penal Code and filed a written opinion (App. B.) in which it held that the defendants could be convicted of a crime requiring them to register as sex offenders, that the dancers could not be so convicted unless the dances were obscene and that each of the dances in the 25 cases were patently lewd so as to obviate the need for proof of community standards.

Rohm was convicted of procuring Drey and Morris in violation of Section 314.2 of the Penal Code, a misdemeanor.

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[1] It may be of more than passing interest that the arrest report identified the victim of the crime as "State of Calif." and the victim's occupation as "sovereign state."

Rohm was granted three years probation on condition that he serve 90 days in the County Jail, of which 75 days were stayed, pay a $625 fine and register as a sex offender under Section 290 of the Penal Code. All Petitioners were required to register immediately after the pronouncement of sentence, but the imposition of the jail sentence and payment of the fine was stayed pending appeal.

Drey was convicted of three counts of violating Section 314.1 of the Penal Code and was granted probation upon the grounds that she serve 30 days in the county jail and register as a sex offender.

Morris and Orth were granted probation, as a condition of which they were required to serve seven days in county jail and register as sex offenders.

On July 8, 1971, the Appellate Department of the Superior Court of the County of Orange issued opinions in each of the 26 cases. Twenty convictions were reversed upon the grounds that the performances consisted of "genuine" dancing which could not under California law be the subject of an offense requiring registration as a sex offender, even if obscene, and that the record did not establish that the dances were patently obscene. However, petitioners' convictions were affirmed upon the ground that the performances did not involve "genuine" dancing and were patently obscene. (App. A.)

On July 27, 1971, the Appellate Department denied petitioners' petition for rehearing and refused to certify

the case to the Court of Appeal. (App. I.) Therefore, the decision of the Appellate Department became the final decision of the highest court in which a decision could be had.

On August 24, 1971, petitioners filed petitions for Writ of Habeas Corpus in the Court of Appeal of the Fourth Appellate District. Said petitions were denied without a hearing or opinion on September 28, 1971. (App. J, K, L, and M.)

On September 23, 1971, petitioner Rohm filed a Petition for Writ of Habeas Corpus in the Supreme Court of the State of California. On September 30, 1971, Orth, Drey and Morris filed petitions in the Supreme Court. Said petitions were denied without a hearing or opinion on October 27, 1971, with two justices voting for a hearing. (App. N, O, P, and Q.)

On August 27, 1971, petitioners were ordered to pay the fines imposed as a condition of probation, but execution of the 15 days imprisonment was stayed until October 29, 1971. On October 28, 1971, execution was again stayed until November 30, 1971.

REASONS RELIED ON FOR ALLOWANCE OF WRIT.

I.

A State May Not Constitutionally Require One Convicted of an Obscenity Offense to Register as a Sex Offender.

A. Introduction.

The essential elements of the crime of which petitioners were convicted was the presentation of live entertainment which was found to be obscene. At the time of the alleged offense the California obscenity law did not apply to live theatrical performances (*Barrows v. Municipal Court*, 1 Cal. 3d 825, 83 Cal. Rptr. 819 (1970)), a vacuum which was filed by the subsequent re-writing of Section 311.6 of the California Penal Code to expressly prohibit obscene live conduct. Therefore, petitioners were prosecuted under the indecent exposure statute, Section 314 of the California Penal Code, which was primarily intended to prohibit persons from exposing themselves on the street, but which has been used in recent years as a vehicle for prosecuting topless and bottomless dancers in nightclubs. *In re Giannini*, 69 Cal. 2d 563, 72 Cal. Rptr. 655 (1968).

In *Giannini*, the California Supreme Court apparently approved the prosecution of topless and bottomless dancers under Section 314 and under Section 647(a) of the California Penal Code, which prohibits lewd conduct in public, provided that the obscenity of the dance be proved. *In re Giannini, supra.* However, the Court did not consider in that case the fact that a conviction under either of those sections imposes upon the defendant a lifetime requirement of registration as a sex offender pursuant to Section 290 of the Penal Code. In *Barrows v. Municipal Court, supra*, at page 829 the

question was considered and the Court held on non-constitutional grounds that the legislature had not intended Section 647(a) to apply to live performances of plays alleged to be obscene. Since its decision in *Barrows,* the California Supreme Court has not ruled on the question of whether Penal Code Section 314 could be applied to obscene live performances involving nudity. However, in the instant series of cases, the Appellate Department of the Superior Court for the County of Orange held that *Barrows* meant that Penal Code Section 314 could not be applied to instances of so-called "genuine dancing", even if obscene. Petitioners' convictions were affirmed on the ground that the performances were not "genuine dancing."

Although not classified as "genuine dancing", the performances which were the subject of Petitioners' conviction were evidently thought to be entitled to the prima facie protection of the First Amendment since a finding of obscenity was necessary for their affirmance. See *In re Giannini, supra.*

Petitioners assert that their convictions and registration as sex offenders are unconstitutional on a number of grounds. The first is that they cannot rationally be classified as sex offenders. The second is that a requirement of lifetime registration is an unconstitutional prior restraint on the exercise of free speech. The third is that they have been denied the equal protection of the law since persons convicted of other types of obscenity offenses are not required to register as sex offenders.[2]

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[2]In *Barrows*, the court did state that these constitutional infirmities would exist if persons convicted of live obscenity perfomances were required to register. 1 Cal. 3d at pp. 826-827. Moreover, the court expressly refused to carve an exemption from the registration requirement for those convicted of obscenity-type offenses. 1 Cal. 3d at p. 824.

B. It Violates Due Process to Require One Convicted of an Obscenity Offense to Register as a Sex Offender.

Where, as here, a legislative classification restricts the exercise of a fundamental right such as that of free expression, the classification cannot be upheld unless it fulfills a compelling state interest. *N.A.A.C.P. v. Button,* 371 U.S. 415 (1963); *Shapiro v. Thompson,* 394 U.S. 618 (1969). A little reflection will convince one that there is no such interest and, indeed, no rational justification for classifying one who exhibits, presents, or engages in obscene performances as a sex offender.

Section 290 of the California Penal Code contains a list of those statutes, conviction of which require registration. The other crimes requiring registration include rape, incest, sodomy, lewd or lascivious acts upon a child under the age of 14, oral copulation, and seduction under promise of marriage. The obscenity statutes are not included in the list. The purpose of registration is to insure that persons convicted of such crimes will be readily available for police surveillance. *Barrows v. Municipal Court, supra,* 1 Cal. 3d at p. 825. Registration is a "penalty and disability imposed as an automatic consequence of conviction." *People v. Taylor,* 178 Cal. App. 2d 472, 477, 3 Cal. Rptr. 186, 189 (1960). Section 290 is based upon the presumption that certain types of major sex offenders are recidivistic and that their registration is necessary to protect the public. *Abbott v. City of Los Angeles,* 53 Cal. 2d 674, 3 Cal. Rptr. 158, 166-167 (1960).

None of the petitioners are sex offenders in any ordinary sense of the word. Their registration cannot possibility benefit the public. Its only conceivable consequence is that they may be questioned or investigat-

ed by the police every time acts of indecent exposure are committed in their neighborhood, even though they could not rationally be considered to have established any tendency to participate in the commission of such crimes. As the California Supreme Court said in Barrows:

> "It would be irrational to impose upon an actor in a theatrical performance or its director a lifetime requirement of registration as a sexual offender because he may have performed or aided in the performance of an act, perhaps an obscene gesture, in a play. It is an errant concept that we cannot attribute to the Legislature that persons convicted of such an offense will require constant police surveillance in order to prevent them from committing similar crimes against society in the future."
>
> *Barrows v. Municipal Court, supra,* 1 Cal. 3d at pp. 826-827, 83 Cal. Rptr. at 822.

C. A Lifetime Requirement of Registration of One Convicted of an Obscenity Offense Is an Unconstitutional Restriction of Free Expression.

> "That a statute which imposes the penalty of lifetime registration as a sexual offender upon those who participate in a play, merely by reason of acts committed therein, would have an inhibiting effect upon the exercise of First Amendment rights is too evident to require elaboration." *Barrows v. Municipal Court, supra,* 1 Cal. 3d at p. 827; 83 Cal. Rptr. at pp. 822-823.

The foregoing statement retains its truth even if it were to be assumed that the registration provision were expressly directed at persons convicted of obscenity offenses.

The First Amendment protects against both indirect and direct restraints on expression, against the subtle as well as the crude, the informal as well as the formal. *Shelton v. Tucker,* 364 U.S. 497 (1960); *Lamont v. Postmaster General,* 381 U.S. 301 (1965); *Bantam Books v. Sullivan,* 272 U.S. 58 (1963). Particular recognition has been given repeatedly to the important role of privacy and even anonymity when speech of an unpopular type is involved. *Gibson v. Florida Investigation Committee,* 372 U.S. 241 (1967). Protection is also given from those restrictions whose chilling effect on speech is to promote an unhealthy self-censorship. *Smith v. California,* 361 U.S. 147 (1959).

In the instant cases, we are dealing with a statute whose purpose as declared by the Supreme Court of the State of California is to make certain persons amenable to police surveillance. There can be no doubt that such a requirement opens the way to excessive restrictions on free expression, whether self-imposed or imposed by the police. Many persons, realizing the loss of privacy inherent in registration, would sharply curtail the forms of expression with which they might be connected in order to avoid all risks of further prosecution, thereby refraining from participation in or presentation of shows which would still not be unlawful, *e.g., Smith v. California, supra.* Other persons might become the targets of overzealous enforcement officers determined to keep their communities free from all taint of the erotic or suggestive. All could be subject to the subtle but relentless psychological pressure that follows from being unable to move anywhere within the State without reporting to the police. Thus, we state again that the inhibiting effects of a registration provision directed at persons convicted of crimes involving obscenity would be self evident.

D. The Requirement of Registration in the Instant Case Denies Petitioners the Equal Protection of the Laws.

The fact that Petitioners have been required to register as sex offenders is due to nothing more than a legislative oversight. As we have explained, the live performance of an obscene dance was not expressly prohibited by any part of the California obscenity laws effective on October 17, 1970. Thus, petitioners were tried and convicted under a section requiring registration whereas, after the effective date of the new section 311.6 of the California Penal Code, the same offense would not require registration. Moreover, none of the other longstanding obscenity offenses (Sections 311 *et seq.* of the California Penal Code) require registration.

Thus, petitioners are the victim of a legislative oversight and radically different penalties are imposed for the same type of crime.

> "It would be arbitrary and vexatious to require that persons in petitioner's position (actors and the director of an allegedly obscene play) should be subject to the registration requirement while those who have violated the laws against obscenity by selling and exhibiting obscene movies, books, and pictures to minors or who employ minors for the purpose of such distribution (§311.2, 311.3, 311.4) should not be subject to such a burden."
>
> *Barrows v. Municipal Court, supra,* 1 Cal. 3d at 827, 83 Cal. Rptr. at 823.

II.

A Judicial Determination That a Dance Is Obscene Does Not Meet Constitutional Requirements When the Record Is Devoid of Any Competent Evidence That The Dance Exceeded Contemporary Community Standards.

An essential element of the modern definition of obscenity is the requirement that the description or representation of sexual matters substantially exceed customary community standards. *Roth v. United States*, 354 U.S. 476 (1967); *Memoirs v. Massachusetts*, 383 U.S. 413 (1966); California Penal Code §311.[3]

In the instant case, there was no evidence offered as to whether or not any of the performances by any of the dancers tried with petitioners exceeded contemporary community standards as a matter of fact. In the absence of such evidence, the trial court ruled that the performances in each of the 20 companion cases

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[3]Although the prurient appeal of allegedly obscene material is to be judged with reference to the average adult, a precise relationship between contemporary standards and obscenity has never been elaborated by this Court. That the measure of obscenity should be sensitive to current standards of taste seems inevitable if the courts and legislatures are to be restrained from banning works or performances which are widely accepted. On the other hand, a reliance on contemporary standards cannot be reduced to a plebescite in which a finding of obscenity—which implies the granting or denial of First Amendment protection—is made to depend on a kind of majority vote. If a film, book or dance could be branded obscene merely because a majority thought it so, the protection of the First Amendment would become illusory. It is for this reason that Section 311 of the California Penal Code wisely requires community standards to be *substantially* exceeded before performances can be labelled obscene. Such a rule is absolutely necessary to provide breathing room for artistic development and imagination. It would be inconceivable if the taste of 51 percent could control the other 49 percent.

were patently obscene because they exceeded any conceivable community standard. The Appellate Department of the Superior Court agreed with the trial judge as to only these six cases, and reversed his findings as to the other twenty cases. (In 16 of those cases the only evidence was that the defendant danced on a stage while nude.)

The California Supreme Court has held that evidence of community standards is required to prove obscenity. *In re Giannini*, 69 Cal. 2d 563, 72 Cal. Rptr. 655 (1968). During the course of its opinion, the court said that evidence was needed if there were to be an even-handed, objective application of the law rather than the personal standards of the jurors or judge, that the trier of fact could not be expected to have personal knowledge of the applicable standard, be it statewide or national, that evidence of community standards was necessary for effective appellate review,[4] and that the analogy to negligence cases was not applicable. *In re Giannini, supra*, 72 Cal. Rptr. at pages 664-665.

The *Giannini* opinion did not pass upon the question whether a performance could be so clearly in excess of community standards that the requirement of evidence would be dispensed with. *In re Giannini, supra*, 72 Cal. Rptr. at pg. 664, Fn. 8. The constitutional problem with a "patent obscenity" exception to the evidentiary requirement is that it reintroduces the subjective view of the juror or judge in a particular case. Appellate review as to whether the "patent obscenity" test was properly applied must also neces-

[4]Although the establishment of community standards is a factual matter, the question of whether such standards were substantially exceeded is ultimately one for the courts to decide.

sarily be subjective, since it cannot be tied to any evidence of community standards. Thus, the exception would defeat the rule.[5]

Therefore, the conviction of petitioners without any evidence of community standards violates the First Amendment and the Due Process Clause of the Fourteenth Amendment.

Conclusion.

For the foregoing reasons this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

McPherson Berrien E. Moore,
Kenneth Scholtz,
Attorneys for Petitioners.

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[5]Although not involved in the instant cases, the problems of applying the "patent obscenity" test in a jury trial are worth considering. May the judge in such a case exclude as irrelevant evidence of contemporary standards if he believes them to have been substantially exceeded as a matter of law? If so, may he instruct the jury that they must find in accordance with his opinion, thereby partially directing a verdict for the prosecution, or must he leave the issue to their unguided discretion? If such a partially directed verdict violates the Sixth Amendment (*United States v. Taylor*, 11 Fed. 470 (7th Circ. 1882)) then application of a "patent obscenity" exception might be limited to court trials, which itself could be an unconstitutional violation of due process, equal protection, and the right to trial by jury.

APPENDIX "A."

On Appeal From the Municipal Court of the Orange County Harbor Judicial District.

Appellate Department, Superior Court of the State of California, County of Orange.

People of the State of California, Plaintiff and Respondent, vs. Cynthia Louise Drey, Rebecca Darlene Morris, Geraldine Clark Orth, Raymond Carl Rohm, Defendants and Appellants. AP-1037, AP-1038, AP-1040, AP-1049, AP-1050, AP-1052.

Hon. Donald Dungan, Judge.

These causes having been submitted and fully considered, judgments are ordered as follows:

It is ORDERED AND ADJUDGED that the judgments made and entered in the Municipal Court of the above designated Judicial District, County of Orange, State of California, in the above-entitled causes be and the same are hereby affirmed.

Under the stipulations and the arrest reports in evidence, there is substantial evidence to support the opinion of the trial judge that the conduct of the so-called dancers was "patently obscene."

As we have indicated in other decisions in companion cases filed concurrently with this one (see *People v. Carlson*, AP-1032), the existence of "patent obscenity" does not by itself justify prosecution under Penal Code Section 314.1 if the conduct is a "theatrical performance." The activities of the bottomless dancers in these particular cases, however, were not part of any genuine dance, did not constitute a "theatrical performance," did not enjoy, *prima facie*, pro-

tection of the First Amendment, and could, therefore, be prosecuted under Section 314.1 of the Penal Code despite *Barrows v. Municipal Court,* 1 C. 3d 821 (1971).

The guilt of the bar owner in Case No. AP-1052 (Rohm) under Penal Code Section 314.2 seems amply clear on the record before us.

Dated this 8th day of July, 1971.

/s/ Herlands
Herlands, Judge
William L. Murray
Murray, Judge
Thompson (R)
Thompson, Presiding Judge

APPENDIX "B."

Opinion of the Municipal Court of Orange County Harbor Judicial District.

In the Municipal Court of Orange County Harbor Judicial District, County of Orange, State of California.

People of the State of California, Plaintiff, vs. Carlson, et al., Defendants. Case Nos. M 56429, 56405, 57479, 57347, 56625, 56601, 56517, 56926, 56519, 56502, 56445, 56728, 56613, 56729, 57619, 56430, 56520, 56559, 56657, 57348, 56945, 56385, 56882, 56518, 56383, 56944, 56558.

Twenty-six cases involving nude performances at the Firehouse Bar in Costa Mesa have been submitted to the Court for decision on the police reports and on a written stipulation describing the area in which the performances took place.

One additional case (*People vs. Rohm*) involves the manager of the Firehouse Bar who is charged with willfully and lewdly procuring, counseling or assisting certain defendants to so expose themselves.

The defendants in the 26 nude performance cases are charged with a violation of Section 314.1 of the Penal Code which reads as follows:

> Every person who willfully and lewdly, either
>
> 1. Exposes his person, or the private parts thereof, in any public place, or in any place where there are present other persons to be offended or annoyed thereby is guilty of a misdemeanor.

The City Prosecutor and the Attorney for the defendants stipulated in writing that in each case the defendant was dancing on a raised platform or stage

located in the center of the establishment, approximately 15 feet long and 5 feet wide and 2 feet above the floor level; that connecting with and immediately adjacent to the stage is a 1½ to 2 foot width bar counter top which completely circles the stage and which is about 1 foot higher than the stage; that bar stools are provided for customers to sit on along the length of the bar counter top; that customers seated on these bar stools are within one to four feet of the edge of the stage and on an approximate eye level with the dancers' private parts.

The facts set forth in the police reports are different for certain of the cases. In 16 cases the police reports show that the defendants were dancing nude on the platform or stage described above. (These cases are: *People vs. Carlson*, M-56429; *People vs. Christy*, M-57479; *People vs. Collins*, M-56625; *People vs. Diebolt*, M-56601; *People vs. Di Fani*, M-56517; *People vs. Drey*, M-56445; *People vs. Featherly*, M-56728; *People vs. Fernandez*, M-56613; *People vs. Fleming*, M-56729; *People vs. Fleming*, M-57619; *People vs. Mahon*, M-56430; *People vs. Martyniuk*, M-56520; *People vs. McClelland*, M-56559; *People vs. A. Miller*, M-56657; *People vs. Odom*, M-56518; *People vs. York*, M-56558.)

In the remaining ten cases the police reports set forth additional facts about the manner in which the nude dances were performed. Three of these cases describe the nude dancers as maneuvering their pelvic areas in a forward and backward manner (*People vs. Cassels*, M-56406; *People vs. Christensen*, M-57347; and *People vs. Miranda*, M-56945).

One case described the above action plus adding that the dancer rubbed her pubic hairs with her hand (*People vs. Orth*, M-56383).

In the case of *People vs. Drey* (M-56926) the defendant spread her legs far apart within a few inches of the customers' faces; raised her leg above customers' faces with her vagina within 2 to 3 inches from their faces; leaned forward toward 3 or 4 customers and allowed her breast to be licked by the customers' tongues; leaned over and placed her breast in a glass of beer located on the bar counter in front of the customer; held popcorn 3 to 4 inches from her vagina and allowed customers to remove the popcorn with their mouths. This was repeated with 2 or 3 different customers. Defendant turned her back on the customers, spread her legs and with her anus 4 to 6 inches from the customer's face lit a match and placing her arm between her legs lit a customer's cigarette. This was repeated 2 or 3 times with different customers. Defendant also lit a cigarette, balanced it on her nipple and invited a customer to take it from this position with his mouth.

In the case of *People vs. Drey* (M-56519) the defendant allowed a customer to light a match and hold it close to her pubic area within 18 inches of the customer's face. In the case of *People vs. Drey* (M-56502) the defendant made lewd gestures to customers suggesting sexual intercourse and oral copulation.

In the case of *People vs. V. Miller* (M-57348) the defendant maneuvered her nude body to within 6 inches of customers' faces.

In *People vs. Miranda* (M-56385) the defendant made hand and body gestures indicating anal and vaginal copulation.

In *People vs. Morris* (M-56882) the defendant placed one foot on the bar counter standing spread legged 4 to 6 inches from the customers and simulated sexual intercourse; raised her leg above the customers' heads, bringing her vagina within 3 to 5 inches from the customers' faces. This action was repeated numerous times.

In the remaining case of *People vs. Rohm* (M-56944) the defendant, the manager of the Firehouse Bar, was shown to be present on the occasions in which the conduct described in *People vs. Drey* (M-56926) and *People vs. Morris* (M-56882) took place.

Defendants first argue that Section 314.1 of the Penal Code does not apply to a performer who dances for an audience in the nude.

Barrows vs. Municipal Court, 1 Cal. 3d 821, involving Section 647a of the Penal Code is cited for this proposition.

I agree with the reasoning set forth in *People vs. Newton,* 9 Cal 3d Supp. 24. The holding in *Barrows vs. Municipal Court, supra,* that Section 311.6 of the Penal Code does not apply to stage performances is not controlling and the words of Section 314.1 and 314.2 of the Penal Code make it clear that the Legislature did intend to make Section 314 applicable to exhibitions on stage.

Defendants next argue that even if Section 314.1 of the Penal Code is held to apply to dances performed in the nude for an audience, the conduct of the dancers in the instant cases was not lewd.

The Supreme Court has held that dancing for an audience is a form of expression that is protected by the

First Amendment to the Constitution. The Supreme Court of California in the case of *In re Giannini,* 69 Cal.2d 563, holds that for a dancer performing for an audience to lose the protection of the First Amendment the People must prove that the dance was obscene and further states that the words obscene and lewd are synonymous.

The obscene or lewd conduct, says the Court, means that to the average person, applying contemporary community standards, the predominant appeal of the conduct, take as a whole, is to prurient interest, i.e., a shameful or morbid interest in nudity, sex or excretion, which goes substantially beyond customary limits of candor and is utterly without redeeming social importance.

The Court in the *Giannini* case states that the determination of obscenity is for juror or judge not on the basis of his personal upbringing or restricted reflection or particular experience of life, but on the basis of contemporary community standards; and that the People must introduce proof by an expert as to what the contemporary community standard is.

The People in the instant cases have not introduced any evidence of what the contemporary community standard is as applied to the conduct described in the police reports and the written stipulation. Ordinarily this would be fatal to the People's case, but the Court in the *Giannini* case recognized that in certain cases the conduct can be so patently obscene or lewd as to obviate the requirement of expert testimony on what the contemporary community standard is.

I find that the conduct of the defendants described in the police reports and in the written stipulation to be so patently lewd that it violates any conceivable community standard. I find the defendants guilty.

In the case of *People vs. Rohm* I find the defendant guilty of procuring defendants Morris and Drey to expose themselves in a lewd manner as described above.

/s/ Donald Dungan
JUDGE

APPENDIX "C."

Complaint — Misdemeanor.

In the Municipal Court of Orange County Harbor Judicial District, County of Orange, State of California.

The People of the State of California, Plaintiff, v. Raymond Carl Rohm, Defendant. Case No M56944. The undersigned declarant and complaint states that he is informed and believes and upon such information and brief declares that on or about 10/17/70, at and in the above-entitled Judicial District, in the County of Orange, State of California, violation of Section(s) 314.2 PC, a misdemeanor was committed by defendant who did willfully and unlawfully procure and assist persons to exhibit themselves for public view in an offensive manner and in such a way as to excite vicious or lewd thoughts and acts.

Said declarant and complainant therefore prays that a warrant may be issued for the arrest of said defendant who may then be dealt with according to law.

Executed on 10/27/70 in the County of Orange, State of California.

I declare under penalty of perjury that the foregoing is true and correct.

Ila M. Dallas
Declarant and Complainant

WITNESSES

APPENDIX "D."

Complaint — Misdemeanor.

In the Municipal Court of Orange County Harbor Judicial District, County of Orange, State of California.

The People of the State of California, Plaintiff, v. Orth, Geraldine Clark, 14358½ Jeanette Lane, Baldwin Park, California, Defendant. Case No. M56383.

COUNT I:

The undersigned declarant and complaint states that he is informed and believes and upon such information and belief declares that on or about August 22, 1970, at and in the above-entitled Judicial District, in the County of Orange, State of California, violation of Section(s) 314.1 CPC, a misdemeanor was committed by GERALDINE CLARK ORTH who did wilfully and unlawfully and lewdly expose her person, and the private parts thereof, to Officer T. Boylan, at 177 East 17th Street, in the City of Costa Mesa, where there was present another person to be offended.

COUNT II:

That on or about August 22, 1970, at and in the above-entitled Judicial District, in the County of Orange, State of California, violation of Section 647(a) California Penal Code, a misdemeanor was committed by GERALDINE CLARK ORTH who did willfully and unlawfully commit acts of disorderly conduct in that she did engage in lewd and dissolute conduct in a public place, to-wit: 177 East 17th Street, Costa Mesa, California, and in a place open to the public and exposed to public view.

Said declarant and complainant therefore prays that a warrant may be issued for the arrest of said defendant who may then be dealt with according to law.

Executed on August 25, 1970 in the County of Orange, State of California.

I declare under penalty of perjury that the foregoing is true and correct.

/s/ J. W. Calvin, Sgt.
Declarant and Complainant

APPENDIX "E."

Complaint — Misdemeanor.

In the Municipal Court of Orange County Harbor Judicial District, County of Orange, State of California.

The People of the State of California, Plaintiff, v. Morris, Rebecca Darlene, 1111 East 7th #11, Pomona, California, Defendant. Case No. M56882.

COUNT I

The undersigned declarant and complaint states that he is informed and believes and upon such information and belief declares that on or about October 17, 1970, at and in the above-entitled Judicial District, in the County of Orange, State of California, violation of Section(s) 314.1 CPC, a misdemeanor was committed by REBECCA DARLENE MORRIS who did willfully and unlawfully and lewdly expose her person, and the private parts thereof, to Officer Miley and Officer Hicks, at 177 East 17th Street, in the City of Costa Mesa, where there was present another person to be offended and annoyed thereby.

COUNT II

That on or about October 17, 1970, at and in the above-entitled Judicial District, in the County of Orange, State of California, violation of Section 647 (a) California Penal Code, a misdemeanor was committed by REBECCA DARLENE MORRIS who did willfully and unlawfully commit acts of disorderly conduct in that she did engage in lewd and dissolute conduct in a public place, to-wit: 177 East 17th Street, Costa Mesa, California, and in a place open to the public and exposed to public view.

Said declarant and complainant therefore prays that a warrant may be issued for the arrest of said defendant who may then be dealt with according to law.

Executed on October 19, 1970 in the County of Orange, State of California.

I declare under penalty of perjury that the foregoing is true and correct.

/s/ J. W. Calvin, Sgt.
Declarant and Complainant

APPENDIX "F."

Complaint — Misdemeanor Amended.

In the Municipal Court of Orange County Harbor Judicial District, County of Orange, State of California.

The People of the State of California, Plaintiff, v. Cynthia Drey, Defendant. Case No. M56519.

COUNT I

The undersigned declarant and complaint states that he is informed and believes and upon such information and belief declares that on or about 9/3/70, at and in the above-entitled Judicial District, in the County of Orange, State of California, violation of Section(s) 314.1PC, a misdemeanor was committed by defendant who did willfully and unlawfully expose her person and private parts thereof in a public place, to wit: a bar, by dancing in the nude on a raised stage where there were present other persons to be offended and annoyed thereby.

COUNT II

That above named defendant at above mentioned date did violate Section 647(a), a misdemeanor, by willfully and unlawfully engaging in lewd and dissolute conduct in a public place, to wit: a bar, which was open to the public and exposed to public view by, while in a squatting position with her legs far apart placing her exposed buttocks approximately 18 inches from a male patron. The above occurred while the defendant was nude.

Said declarant and complainant therefore prays that a warrant may be issued for the arrest of said defendant who may then be dealt with according to law.

Executed on 10/21/70 in the County of Orange, State of California.

I declare under penalty of perjury that the foregoing is true and correct.

Declarant and Complainant

APPENDIX "G."

Complaint — Misdemeanor Amended.

In the Municipal Court of Orange County Harbor Judicial District, County of Orange, State of California.

The People of the State of California, Plaintiff, v. Cynthia Drey, Defendant. Case No. M56502.

COUNT I

The undersigned declarant and complaint states that he is informed and believes and upon such information and belief declares that on or about 9/4/70, at and in the above-entitled Judicial District, in the County of Orange, State of California, violation of Section(s) 314.1 PC, a misdemeanor was committed by defendant who did willfully and unlawfully expose her person and private parts thereof in a public place, to wit: a bar, by dancing in the nude on a raised stage within six feet of the patrons, where there were present other persons to be offended and annoyed thereby.

COUNT II

That above named defendant at above mentioned date did violate Section 647(a), a misdemeanor, by willfully and unlawfully engaging in lewd or dissolute conduct in a public place, to wit: a bar, open to the public by, while dancing nude on a raised stage, making lewd gestures to the patrons. The above occurred while the defendant was nude.

Said declarant and complainant therefore prays that a warrant may be issued for the arrest of said defendant who may then be dealt with according to law.

Executed on 10/21/70 in the County of Orange, State of California.

I declare under penalty of perjury that the foregoing is true and correct.

Declarant and Complainant

ARRESTING AGENCY: CMPD.

WITNESSES

APPENDIX "H."

Complaint — Misdemeanor.

In the Municipal Court of Orange County Harbor Judicial District, County of Orange, State of California.

The People of the State of California, Plaintiff, v. Drey, Cynthia Louise, 12744 #E Newport Avenue, Tustin, California, Defendant. Case No. M56926.

COUNT I:

The undersigned declarant and complaint states that he is informed and believes and upon such information and belief declares that on or about October 17, 1970, at and in the above-entitled Judicial District, in the County of Orange, State of California, violation of Section(s) 314.1 CPC, a misdemeanor was committed by CYNTHIA LOUISE DREY who did willfully and unlawfully and lewdly expose her person, and the private parts thereof, to Officer Hicks and Officer Miley, at 177 East 17th Street, in the City of Costa Mesa, where there was present another person to be offended and annoyed thereby.

COUNT II:

That on or about October 17, 1970, at and in the above-entitled Judicial District, in the County of Orange, State of California, violation of Section 647 (a) California Penal Code, a misdemeanor was committed by CYNTHIA LOUISE DREY who did willfully and unlawfully commit acts of disorderly conduct in that she did engage in lewd and dissolute conduct in a public place, to-wit: 177 East 17th Street, Costa Mesa, California, and in a place open to the public and exposed to public view.

COUNT III:

That on or about October 17, 1970, at and in the above-entitled Judicial District, in the County of Orange,

State of California, violation of Section 314.1 California Penal Code, a misdemeanor was committed by CYNTHIA LOUISE DREY who did willfully and unlawfully and lewdly expose her person, and the private parts thereof, to Officer Hicks and Officer Miley, at 177 East 17th Street, in the City of Costa Mesa, where there was present another person to be offended and annoyed thereby.

COUNT IV:

That on or about October 17, 1970, at and in the above-entitled Judicial District, in the County of Orange, State of California, violation of Section 647 (a) California Penal Code, a misdemeanor was committed by CYNTHIA LOUISE DREY who did willfully and unlawfully commit acts of disorderly conduct in that she did engage in lewd and dissolute conduct in a public place, to-wit: 177 East 17th Street, Costa Mesa, California, and in a place open to the public and exposed to public view. Said declarant and complainant therefore prays that a warrant may be issued for the arrest of said defendant who may then be dealt with according to law.

Executed on October 26, 1970 in the County of Orange, State of California.

I declare under penalty of perjury that the foregoing is true and correct.

/s/ J. W. Calvin, Sgt.

Declarant and Complainant

Officer Hicks, Los Alamitos Police Department; Officer Miley, Los Alamitos Police Department.

APPENDIX "I."

Minute Order.

Appellate Department of the, in the Superior Court of the State of California, in and for the County of Orange.

Court convened at 10:00 A.M. July 27, 1971, present Hon. Herlands J., Hon. Murray, J., Hon. Thompson, Presiding, Judge; H. J. Gallagher, Deputy Clerk; ....., Deputy Sheriff; ....., Reporter; and the following proceedings were had:

AP-1037 PEOPLE vs. DREY, Cynthia Louise

AP-1038 PEOPLE vs. DREY, Cynthia Louise

AP-1040 PEOPLE vs. DREY, Cynthia Louise

AP-1049 PEOPLE vs. MORRIS, Rebecca Darlene

AP-1050 PEOPLE vs. ORTH, Geraldine Clark

AP-1052 PEOPLE vs. ROHM, Raymond Carl

Petition for rehearing or certification to the Court of Appeal having been filed, the Court now rules: Petitions and each are hereby denied as to each defendant. ENT: 7-27-71

APPENDIX "J."

Minute Order.

Court of Appeal—State of California, Fourth Appellate Division, Division Two.

In re: Raymond C. Rohm on Habeas Corpus. 4 Crim. No. 4901 (Orange County #AP-1052).

Filed: Sept. 28, 1971.

BY THE COURT:

The Petition for Writ of Habeas Corpus is DENIED.

Dated September 28, 1971

Gabbert, J. Acting P.J.

APPENDIX. "K."

Minute Order.

Court of Appeal—State of California, Fourth Appellate Division, Division Two.

In re: Geraldine Clark Orth on Habeas Corpus. 4 Crim. No. 4903 (Orange County #AP 1040).

Filed, Sept. 28, 1971.

BY THE COURT:

The Petition for Writ of Habeas Corpus is DENIED.

Dated; September 28, 1971

Gabbert, J., Acting P.J.

APPENDIX "L."

Minute Order.

Court of Appeal—State of California, Fourth Appellate Division, Division Two.

In re: Rebecca Darlene Morris on Habeas Corpus. 4 Crim. No. 4904. (Orange County #AP 1038).

Filed: Sept. 28, 1971.

BY THE COURT:

The petition for Writ of Habeas Corpus is DENIED.

Dated September 28, 1971.

Gabbert, J., Acting, P.J.

APPENDIX "M."

Minute Order.

Court of Appeal—State of California, Fourth Appellate Division, Division Two.

In re: Cynthia Louis Drey on Habeas Corpus. 4 Crim. No. 4902. (Orange County #AP 1037).

Filed: Sept. 28, 1971.

BY THE COURT:

The Petition for Writ of Habeas Corpus is DENIED.

Dated September 28, 1971.

Gabbert, J. Acting P.J.

APPENDIX "N."

Order Denying Writ of Habeas Corpus. Criminal No. 15871

In the Supreme Court of the State of California, in Bank.

In re Rohm on Habeas Corpus.

Filed: Oct. 27, 1971.

Petition for writ of habeas corpus DENIED.

Peters, J., and Tobriner, J., are of the opinion that the respondent should be ordered to show cause why the relief prayed for should not be granted.

/s/ Wright
Chief Justice

I, G. E. BISHEL, Clerk of the Supreme Court of the State of California, do hereby certify that the preceding is a true copy of an order of this Court, as shown by the records of my office.

Witness my hand and the seal of the Court this 27 day of Oct. 27, A.D. 1971.

By /s/ J. Roger
Deputy Clerk

APPENDIX "O."

Order Denying Writ of Habeas Corpus. Criminal No. 15886

In the Supreme Court of the State of California in Bank.

In re ORTH on Habeas Corpus.

Filed Oct. 27, 1971.

Petition for writ of habeas corpus DENIED.

Peters, J., and Tobriner, J., are of the opinion that the respondent should be ordered to show cause why the relief prayed for should not be granted.

/s/ Wright
Chief Justice

I, G. E. BISHEL, Clerk of the Supreme Court of the State of California, do hereby certify that the preceding is a true copy of an order of this Court, as shown by the records of my office.

Witness my hand and the seal of the Court this ..... day of OCT. 27, 1971 A.D. 19.....

By /s/ J. Rogers
Deputy Clerk

APPENDIX "P."

Order Denying Writ of Habeas Corpus.
Criminal No. 15884

In the Supreme Court of the State of California in Bank.

In re MORRIS on Habeas Corpus.

Filed: Oct. 27, 1971.

Petition for writ of habeas corpus DENIED.

Peters, J., and Tobriner, J., are of the opinion that the respondent should be ordered to show cause why the relief prayed for should not be granted.

/s/ Wright
Chief Justice

I, G. E. BISHEL, Clerk of the Supreme Court of the State of California, do hereby certify that the preceding is a true copy of an order of this Court, as shown by the records of my office.

Witness my hand and the seal of the Court this ..... day of OCT. 27, 1971 A.D. 19.....

By /s/ J. Rogers
Deputy Clerk

APPENDIX "Q."

Order Denying Writ of Habeas Corpus.
Criminal No. 15885

In the Supreme Court of the State of California in Bank.

In re DREY on Habeas Corpus.

Filed: Oct. 27, 1971.

Petition for writ of habeas corpus DENIED.

Peters, J., and Tobriner, J., are of the opinion that the respondent should be ordered to show cause why the relief prayed for should not be granted.

/s/ Wright
Chief Justice

I, G. E. BISHEL, Clerk of the Supreme Court of the State of California, do hereby certify that the preceding is a true copy of an order of this Court, as shown by the records of my office.

Witness my hand and the seal of the Court this ..... day of OCT. 27, 1971 A.D. 19.....

By /s/ J. Rogers
Deputy Clerk.

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IN THE

Supreme Court of the United States

Supreme Court, U.S.
FILED
MAR 2 1972
E. ROBERT SEAVER, CLERK

October Term, 1971
No. 71-662

RAYMOND CARL ROHM, CYNTHIA LOUISE DREY, GERALDINE CLARK ORTH and REBECCA DARLENE MORRIS,
Petitioners,

vs.

STATE OF CALIFORNIA,
Respondent.

Answer to Petition for Writ of Certiorari to the Appellate Department of the Superior Court of the State of California.

ROY E. JUNE,
City Attorney of Costa Mesa, County of Orange, State of California,

ROBERT G. SKINNER,
Deputy City Attorney of Costa Mesa, County of Orange, State of California,

CECIL HICKS,
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IN THE

Supreme Court of the United States

October Term, 1971
No. 71-662

RAYMOND CARL ROHM, CYNTHIA LOUISE DREY, GERALDINE CLARK ORTH and REBECCA DARLENE MORRIS,
Petitioners,

vs.

STATE OF CALIFORNIA,
Respondent.

Answer to Petition for Writ of Certiorari to the Appellate Department of the Superior Court of the State of California.

Statement of the Case.

Petitioners, after a court trial had in the Municipal Court of Orange County Harbor Judicial District, were found guilty of having violated California Penal Code Sections 314.1 and 314.2, respectively, which state:

> Every person who wilfully and lewdly, either
>
> 1. Exposes his person, or the private parts thereof, in any public place, or in any place where there are present other persons to be offended or annoyed thereby; or
>
> 2. Procures, counsels, or assists any person so to expose himself or take part in any model artist exhibition, or to make any other exhibition of himself to public view, or the view of any number of persons, such as is offensive to decency, or is adapted to excite to vicious or lewd thoughts or acts, is guilty of a misdemeanor.

The facts upon which the convictions are bottomed are set forth in the Opinion of the Municipal Court to be found at pages five and six of the Appendix to the Petition and are as follows:

> One case described the above action plus adding that the dancer rubbed her pubic hairs with her hand (*People vs. Orth*, M-56383).
>
> In the case of *People vs. Drey* (M-56926) the defendant spread her legs far apart within a few inches of the customers' faces; raised her leg above customers' faces with her vagina within 2 to 3 inches from their faces; leaned forward toward 3 or 4 customers and allowed her breast to be licked by the customers' tongues; leaned over and placed her breast in a glass of beer located on the bar counter in front of the customer; held popcorn 3 to 4 inches from her vagina and allowed customers to remove the popcorn with their mouths. This was repeated with 2 or 3 different customers. Defendant turned her back on the customers, spread her legs and with her anus 4 to 6 inches from the customer's face lit a match and placing her arm between her legs lit a customer's cigarette. This was repeated 2 or 3 times with different customers. Defendant also lit a cigarette, balanced it on her nipple and invited a customer to take it from this position with his mouth.
>
> In the case of *People vs. Drey* (M-56519) the defendant allowed a customer to light a match and hold it close to her pubic area within 18 inches of the customer's face. In the case of *People vs. Drey* (M-56502) the defendant made lewd ges-

tures to customers suggesting sexual intercourse and oral copulation.

In *People vs. Morris* (M-56882) the defendant placed one foot on the bar counter standing spread legged 4 to 6 inches from the customers and simulated sexual intercourse; raised her leg above the customers' heads, bringing her vagina within 3 to 5 inches from the customers' faces. This action was repeated numerous times.

In the remaining case of *People vs. Rohm* (M-56944) the defendant, the manager of the Firehouse Bar, was shown to be present on the occasions in which the conduct described in *People vs. Drey* (M-56926) and *People vs. Morris* (M-56882) took place.

The Appellate Department of the Orange County Superior Court in affirming the Judgments (See Appendix to Petition, pp. 1-2) stated:

> The activities of the bottomless dancers in these particular cases, however, were not part of any genuine dance, did not constitute a "theatrical performance," did not enjoy, *prima facie*, protection of the First Amendment, and could, therefore, be prosecuted under Section 314.1 of the Penal Code despite *Barrows v. Municipal Court*, 1 Cal.3d 821 (1971).
>
> The guilt of the bar owner in case No. Ap 1052 (Rohm) under Penal Code Section 314.2 seems amply clear on the record before us.

Petitioners upon conviction fell under the State registration requirements (California Penal Code Section 290) which applies to all those who are considered sex offenders.

Issues Presented.

I.

Whether Petitioner has Properly Raised the Federal Question it Seeks to Litigate.

II.

Whether a State Requirement that Sex Offenders must Register with the Police at Given Times and Places is Unconstitutional.

III.

Whether "Indecent Exposure", a Crime under California Law Changes Character so as to Render the Application of Registration Requirements Unconstitutional because in Violation of First Amendment Rights when the Crime Occurs on a Stage in a Beer Bar.

ARGUMENT.

I.

Petitioners Have Failed to Properly and Timely Raise the Federal Question so as to Give This Honorable Court Jurisdiction.

The Petition merely alleges at page 8 of the Petition that:

> On December 2, 1970, petitioners demurred to the complaints; said demurrers were overruled. Said demurrers were based upon the proposition that the complaints had failed to state public offenses and that a person charged with presenting obscene entertainment could not be convicted of a crime which required registration as a sex offender.

A Demurrer in the State of California is controlled by California Penal Code Section 1004 which provides in its pertinent part that:

> The defendant may demur to the accusatory pleading at any time prior to the entry of a plea, *when it appears upon the face thereof* either:
>
> 1. If an indictment, that the grand jury by which it was found had no legal authority to inquire into the offense charged, or, if an information or complaint that the court has no jurisdiction of the offense charged therein;
>
> 2. That it does not substantially conform to the provisions of Sections 950 and 952, and also Section 951 in case of an indictment or information;
>
> 3. That more than one offense is charged, except as provided in Section 954;
>
> 4. That the facts stated do not constitute a public offense;
>
> . . .

In the case at hand the complaints (See Petition, Appendix C, D, E and F) merely allege violation of Penal Code section 314. Argument on the applicability of Penal Code Section 290 to the conduct involved would thus be improper on demurrer.

Moreover, the federal question presented here is *not* the applicability of Penal Code Section 314 to the conduct in question *but* the propriety of the application of the registration requirements imposed by Penal Code Section 290 to a conviction based on conduct such as here involved. *This* issue was never presented and never determined by the state courts.

Considering that Penal Code Sections 290.5 and 1203.4 allow for relief from the provisions of Penal Code Section 290 in certain instances and under certain conditions, it might well be that, had the State Courts been properly presented with the problem at the time of sentencing or on appeal, they might have made a determination favorable to Petitioners.

Under the circumstances, therefore, Rspondent submits that Petitioner having failed to comply with Rule 23(f) of the *Rules of the Supreme Court of the United States*, the federal question has not been properly presented and the Petition should be denied.

II.

A State Statute Requiring Sex Offenders to Register With the Police Department at Certain Times and Places Is Not Constitutionally Prohibited.

Statutes requiring registration by various types of criminals have not *per se* been held to be unconstitutional. Thus *Lambert v. California*, 355 U.S. 225, 2 L.Ed.2d 228, 78 S.Ct. 240; for example, found that requiring a felon to register as such was proper pro-

vided that no conviction could be had where the defendant was not aware of the requirement. The Court in that case narrowly framed the issue by stating:

> The question is whether a registration act of this character violates due process where it is applied to a person who has no actual knowledge of his duty to register, and where no showing is made of the probability of such knowledge.

The Court, in that case, however, recognizes and reaffirms the validity of registration laws and goes on to say:

> Registration laws are common and their range is wide. *Cf. New York ex rel. Bryant v. Zimmerman*, 278 U.S. 63, 73 L.Ed. 184, 49 S.Ct. 61, 62 A.L.R. 785; *United States v. Harriss*, 347 U.S. 612, 98 L.Ed. 989, 74 S.Ct. 808; *United States v. Kahriger*, 345 U.S. 22, 97 L.Ed. 754, 73 S.Ct. 510.

The dissenting opinion points out:

> The present laws of the United States and of the 48 States are thick with provisions that command that some things not be done and others be done, although persons convicted under such provisions may have had no awareness of what the law required or that what they did was wrongdoing. The body of decisions sustaining such legislation, including innumerable registration laws, is almost as voluminous as the legislation itself. The matter is summarized in *United States v. Balint*, 258 U.S. 250, 252, 66 L.Ed. 604, 605, 42 S.Ct. 301:
>
> "Many instances of this are to be found in regulatory measures in the exercise of what is called the police power where the emphasis of the

> statute is evidently upon achievement of some social betterment rather than the punishment of the crimes as in cases of mala in se."

The California Supreme Court, while holding the registration requirement statute to be constitutional in *Abbott v. City of Los Angeles*, 53 Cal. 2d 674, found the Los Angeles ordinance void because it held the field to have been preempted by California Penal Code Section 290. Subsequently, in *Barrows v. Superior Court*, 1 Cal.3d 821, 835-836, the Supreme Court reiterated the validity of the section and set forth the *purpose* of the section as being properly related to crime prevention. The section, says the Court:

> applies automatically when a person is convicted of one of the enumerated offenses and imposes a lifelong requirement of registration and re-registration absent a court order releasing the registrant from the penalties and disabilities of his conviction under section 1203.4 (*People v. Taylor* (1960) 178 Cal.App.2d 472, 477 [3 Cal.Rptr. 186]) or the issuance of a certificate of rehabilitation under section 4852.01 et seq. (§ 290.5). The purpose of section 290 is to assure that persons convicted of the crimes enumerated therein shall be readily available for police surveillance at all times because the Legislature deemed them likely to commit similar offenses in the future. (*Kelly v. Municipal Court* (1958) 160 Cal.App. 2d 38, 45 [324 P.2d 990].)

In light of the above authorities Respondent submits that if the evidence in this case supports the finding that Petitioners violated *not* an obscenity statute but an *indecent exposure* statute, Penal Code Section 290 as applied to crimes of a sexual nature must be found to be proper.

III.

The Type of Conduct Here Involved Is Not Protected by the First Amendment and Its Punishment Cannot Possibly "Chill" the Exercise of First Amendment Rights.

California Penal Code Section 314 prohibits lewd and indecent exposure in a public place. Both the Municipal Court and the Appellate Department of the Superior Court in this case properly found that conduct *not* to be part of a performance, and the conduct of Petitioners is certainly "lewd" and just as certainly "nude". The fact that what was done was done on a raised platform rather than in the street does not make the indecent exposure more of a performance and less a crime of a sexual nature. Here as in *Hoffman v. Carson*, 250 So.2d 891, 893, appeal dismissed by This Honorable Court on December 7, 1971, "for lack of a federal question", Petitioners urge that:

> Her actions are interpretations of accompanying music, and that this is her means of communicating her ideas of freedom to the assembled patrons of the lounge. It is asserted that this method of expression is a form of speech warranting the protection of the First Amendment, unless found to be obscene under the *Roth-Memoirs* test of obscenity. *Roth v. United States*, 354 U.S. 476, 77 S. Ct. 1304, 1 L.Ed.2d 1498 (1959); *A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney General of Com. of Massachusetts*, 383 U.S. 413, 86 S.Ct. 975, 16 L.Ed.2d 1 (1966).

And here as in that case it must be concluded that:

> Appellant loses sight of the distinction between speech and conduct. The statute is not directed at

> First Amendment rights of free expression, nor does it concern itself with obscenity as does Fla. Stat. Chapter 847, F.S.A. Rather, it is directed at the exposure of sexual organs and nudity, a matter of conduct thought to be a crime under the common law [*e.g. Commonwealth v. Broadland*, 315 Mass. 20, 51 N.E.2d 961 (1943); *Noblett v. Commonwealth*, 194 Va. 241, 72 S.E.2d 241 (1952)], and generally considered as having a reasonable relationship to the public welfare, and, therefore, within the police power of the Legislature.

As so aptly stated by Justice Gardner in *Crownover v. Musick*, 18 Cal.App.3d 181, 189 (hearing granted by the California Supreme Court on other grounds):

> This portion of Ordinance No. 2356 has no chilling effects on any First Amendment rights of naked waitresses and waiters. Any chill they experience comes from their nudity, not from Ordinance No. 2356.

Petitioner cites as the sole authority in support of his position the California Supreme Court opinion of *Barrows v. Municipal Court*, 1 Cal.3d 825, 826-827. That case, however, argues the inapplicability of California Penal Code Section 290 to *simulated sexual* acts performed on stage—more specifically to a simulated act within the context of a play. It is not and was never intended to apply to real acts. That court states:

> It would be irrational to impose upon an *actor* in a *theatrical performance* or its director a lifetime requirement of registration as a sexual offender because he may have performed or aided in the performance of an act, *perhaps an obscene gesture, in a play.*

That court goes on to caution against the broad interpretation of the opinion which Petitioners suggest:

> Our holding here does not suggest that acts which are independently prohibited by law may be consummated without sanction on the stage merely because they occur during the course *of a theatrical* play. Dramatic *license would not supply indulgence for the actual murder of the villain, the rape of the heroine, or the maiming of the hero. (emphasis added)*

What Petitioners indirectly suggest is that no act punishable under Section 290 can be prosecuted against if performed on a stage. Let us assume the play entitled *The Beard*, instead of ending with an act of *simulated oral copulation* had ended with actual oral copulation. Can it be seriously contended that the act could not be punished? A careful analysis shows that the decision, while in many ways incongruous, is not that far fetched. Can it be in fact said that the girl who acts the part of the prostitute in a play is guilty of soliciting? Can the girl who plays Lady Chatterly be guilty of adultery? Of course not! And the reason is clear: A play is a make-believe world where an act cannot be taken out of context from the totality of the performance.

That the *Barrows* decision is limited to theater plays and is not applicable to *all* forms of entertainment can be deduced from the language of the decision. While the court begins with the sweeping statement that 647(a) "was not intended to apply to a live theatrical performance before an audience," the later language of the court is far more restrictive. The opinion in fact goes on to say:

> We begin with the premise that live plays performed in a theater before an audience are entitled to . . . protection.

After an in-depth history of the origin of the theater and of Section 647(a), the Court concludes:

> We hold here *only* that the consequences of applying Section 647, subdivision (a), to *acts performed in a play* . . . all indicate that the legislature did not intend those statutes (to wit: 647a and 311.6) to apply to theatrical performances. (*emphasis added*)

The totality of the *Barrows'* opinion therefore argues against rather than for Petitioners' contention. And Respondent thus respectfully submits that where as here the conduct constituted not an infringement of the obscenity law but a crime of a sexual nature, California Penal Code Section 290 is just as properly and constitutionally applied as if the conduct had occurred in the middle of the town's Main street and for the very same reasons.

Accordingly, and for all the above reasons, Respondents urge This Honorable Court to deny the Petition.

Dated this 1st day of March, 1972.

Respectfully submitted,

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